

NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION II

No. CACR 07-877

JUAN ROLANDO VIGIL

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered FEBRUARY 27, 2008

APPEAL FROM THE SEBASTIAN
COUNTY CIRCUIT COURT,
FORT SMITH DISTRICT
[NOS. CR-97-94-G, CR-97-938]

HONORABLE J. MICHAEL
FITZHUGH, JUDGE

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Juan Rolando Vigil pleaded guilty to arson and theft, and on April 7, 1998, he was sentenced to four and a half years in prison, to be followed by a suspended imposition of sentence of fifteen and a half years. On February 28, 2007, the State filed a petition to revoke appellant's suspended imposition of sentence, alleging that after being paroled on October 19, 1999, Mr. Vigil violated his conditions by violating a state law. Specifically, the State alleged that between January 1, 2000, and December 31, 2000, Mr. Vigil committed sexual assault in the second degree. After a hearing held on June 27, 2007, the trial court revoked appellant's suspended imposition of sentence, and sentenced him to five years in prison to be followed by a suspended imposition of sentence of three years, one month, and

twenty-one days. Mr. Vigil now appeals from the order of revocation, arguing that there was insufficient evidence that he violated a condition. We affirm.

To revoke a suspended sentence, the burden is on the State to prove a violation of a condition by a preponderance of the evidence. *Palmer v. State*, 60 Ark. App. 97, 959 S.W.2d 420 (1998). On appellate review the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *Id.*

The victim in this case was K.H., and K.H.'s mother, Traci Rozel, testified for the State at the revocation hearing. Ms. Rozel stated that K.H. is now thirteen years old. Ms. Rozel testified that she dated Mr. Vigil around the end of 1999 and early 2000 for a period of about six months. Ms. Rozel indicated that either in the summer of 2000 or summer of 2001, K.H. was visiting Ms. Rozel's brother and sister-in-law in California and made a disclosure about Mr. Vigil. However, K.H. later recanted the allegations. Ms. Rozel explained, "When she mentioned it the first time I had asked her to tell me, to go into more detail because that way I could call the police or whatever needed to be done and at that point she said, 'no.'" A couple of years after Ms. Rozel's relationship with Mr. Vigil had ended, Mr. Vigil came by to visit briefly, and according to Ms. Rozel, K.H. did not want to talk to him but was friendly at her request.

K.H. testified that she is fifteen years old. She stated that Mr. Vigil dated her mother when she was five or six. K.H. identified three instances where Mr. Vigil touched her inappropriately. On one occasion, she was lying in bed with her mother and Mr. Vigil while they watched a movie, and "he kept touching me in my underwear and everything, and I was

trying to move away and he grabbed my thigh.” K.H. testified that another incident occurred while her mother was taking a shower and she was lying in bed with Mr. Vigil, and Mr. Vigil grabbed her hand and put it on his penis. At another time, Mr. Vigil tried to give K.H. a hickey. K.H. testified that after the first incident, Mr. Vigil asked her to keep “our secret.”

K.H. acknowledged that she had previously changed her story about the allegations against Mr. Vigil, and that she did not report the allegations to any authorities until November 2006. She testified:

I told my mom like that summer. I went to my aunt and uncle’s in California and we were watching a show about it and she was talking to me and my cousin about how we should tell someone if that happened, and I told her. My uncle came home from work and they told me that we were going to have to like go to court and everything. So, I told him I was lying and it never happened because I didn’t want that to happen, because I was scared. These instances did happen. I am telling the truth.

. . . .

The Judge should believe that I am telling the truth about it today because when I told them that I lied about it was because I was scared and I didn’t want to go to court and I was so young and I just didn’t want to have to go through all that. Then I realized that what had happened was wrong and everything. I don’t want it to happen again.

Officer Tamara Jones of the Arkansas State Police investigated the allegations and interviewed Mr. Vigil in December 2006. During the interview, Mr. Vigil acknowledged having a previous relationship with Ms. Rozel. He further admitted that he had been alone with K.H. on numerous occasions, but indicated that he was very cautious about being alone with her, and would make sure that she did not get close to his private area. During the interview, Mr. Vigil said that on one occasion K.H. got in bed with him, but that her mother

told her to get down. When questioned about K.H.'s allegations against him, Mr. Vigil repeatedly denied them.

On appeal, Mr. Vigil argues that the trial court's finding that he violated a condition of his suspension during the term of his suspended imposition of sentence was clearly against the preponderance of the evidence. He first contends that it was speculation to conclude that he committed any sexual acts against K.H., noting that the victim has lied in the past to her uncle and mother about what did or did not happen, and further noting that he has consistently denied the allegations. Moreover, Mr. Vigil submits that the testimony of K.H. does not show that the acts he allegedly committed occurred after his suspended imposition of sentence became effective. Appellant points out that in K.H.'s testimony she testified that she was currently fifteen years old and that the alleged acts occurred when she was five or six. According to the appellant, this raises the possibility that the acts could have occurred in 1997 or 1998. Mr. Vigil was sentenced for arson and theft on April 7, 1998, and was not paroled from prison until October 19, 1999, at which time his suspension commenced.

We hold that the trial court's finding that Mr. Vigil committed a sexual offense against K.H. was not clearly against the preponderance of the evidence. Sexual assault in the second degree is committed by a person if the person, being eighteen years of age or older, engages in sexual contact with another person who is less than fourteen years of age and not the person's spouse. *See* Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2006).¹ "Sexual contact" is

¹This offense was called sexual abuse in the first degree at the time of the occurrences in 2000, pursuant to Ark. Code Ann. § 5-14-108(a)(4) (Repl. 1997). That section was later repealed by Act 1738 of 2001. While the State's revocation petition mistakenly references second-degree sexual assault, the pertinent elements of the crimes

defined as “any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female.” Ark. Code Ann. § 5-14-101(a) (Repl. 2006).

K.H. testified that Mr. Vigil was in bed with her and “kept touching me in my underwear,” and then asked her to keep it a secret. K.H. stated that on a subsequent occasion Mr. Vigil put her hand on his penis. This testimony sufficiently proved illicit sexual contact. And while K.H. admitted that she had previously lied about the contact, she testified that she was telling the truth at the revocation hearing. It is for the fact-finder to weigh inconsistent evidence and to make credibility determinations. *Brown v. State*, 95 Ark. App. 348, 237 S.W.3d 95 (2006). Moreover, the testimony of the victim alone may constitute substantial evidence to support a conviction for sexual assault. *Id.* K.H.’s testimony was sufficient to establish, by a preponderance of the evidence, that Mr. Vigil violated his suspended sentence by committing another offense.

We further hold that while there were inconsistencies in the testimony as to when the violations occurred, this was a credibility determination to be resolved by the trial court. Mr. Vigil correctly asserts that K.H.’s testimony indicated that the events occurred when she was a child of five or six in 1997 or 1998. However, K.H.’s mother testified that the period of time that she dated appellant was between late 1999 or early 2000, and that K.H. first disclosed the sexual contact about a year after that, in the summer of 2000 or 2001. The trial court was permitted to credit this testimony, and it established that the violations occurred

are identical and Mr. Vigil raised no issue regarding this discrepancy either below or on appeal.

after Mr. Vigil had been paroled from prison on October 19, 1999, and his suspended imposition of sentence had started.

Affirmed.

GLADWIN and HEFFLEY, JJ., agree.